Editor's note: Secretary Assumed Jurisdiction and issned a stay of effect of the decision by memorandum dated Dec. 20, 1988; decision reinstated, stay lifted by Order dated Jan. 6, 1994, See 102 IBLA 362A th E below.

STATE OF ALASKA

IBLA 85-768 Decided June 10, 1988

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving for interim conveyance to the Chugach Alaska Corporation the oil and gas estate in certain lands, including submerged lands, within Regional Selection AA-50379-3.

Reversed in part.

l. Alaska: Land Grants and Selections--Alaska: Navigable Waters: Generally--Alaska: Statehood Act--Navigable Waters--State Grants--State Lands--Submerged Lands

Lands under navigable waters were held for the benefit of future states, and a state's title to such lands cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state.

APPEARANCES: Michael W. Sewright, Esq., Kenneth C. Powers, Esq., Assistant Attorneys General, Anchorage, Alaska, for the State of Alaska; F. Christopher Bockmon, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The State of Alaska (State) has appealed from a decision dated June 14, 1985, by the Alaska State Office, Bureau of Land Management (BLM), which approved for interim conveyance to the Chugach Alaska Corporation (CAC), the oil and gas estate in certain lands within Regional Selection AA-50379-3. Included in BLM's approval for interim conveyance was the submerged land beneath the Katalla River.

By order dated February 11, 1987, the Board approved a stipulation by BLM, CAC, and the State segregating the bed of the Katalla River from the other lands included in BLM's decision and remanded the case in part for conveyance of those lands. Accordingly, the present appeal is limited to the bed of the Katalla River. 1/

1/ CAC has not participated in the appeal.

The issue before the Board is whether the bed of the Katalla River was included in a Federal reservation for the Chugach National Forest, or whether, as the bed of a navigable river 2/ it passed to Alaska on the date of statehood, January 3, 1959.

The history of the Chugach National Forest reservation is related in BLM's Answer. By Presidential proclamation dated December 24, 1892, and citing sections 14 and 24 of the Act of March 3, 1891, 26 Stat. 1095, the Afognak Forest and Fish Culture Reserve was established. Its purposes were to protect salmon and other fisheries, aquatic wildlife, birds, timber, and other plantlife on the reserved lands, and to establish fish culture stations (BLM Exh. A). By Presidential proclamation dated July 23, 1907, the Chugach National Forest was established as a reservation. Its boundary, as described in the text and depicted on an accompanying map, ran along the main divide of the Chugach Mountains, along the eastern mainland shore of the Kenai peninsula, across the edge of the Gulf of Alaska south to Prince William Sound, and along the eastern bank of the Copper River, to embrace all of Prince William Sound and the lower length of the Copper River. Excluded from the reserved lands were several coastal towns and settlements. The 1907 proclamation again cited the Act of March 3, 1891, as authority for establishing the reservation.

By Exec. Order No. 908, dated July 2, 1908, the Chugach and Afognak reservations were consolidated and renamed the Chugach National Forest (BLM Exh. C). By Presidential proclamation dated February 23, 1909, the Chugach National Forest was enlarged to embrace, inter alia, the entire drainage and delta of the Katalla River (BLM Answer at 3; Exh. D). This proclamation declared that the earlier reservations for forest purposes and fish culture stations continued to be effective on the withdrawn lands and ranked the withdrawal for fish culture stations as the "dominant one." Further Presidential proclamations of September 19, 1907, and August 2, 1915, deleted and/or added lands to the reservation (BLM Answer at 3, 4; Exhs. E, F).

BLM's rationale for approving the riverbed lands as proper for conveyance cites the proclamation of February 23, 1909, section 5 of the Submerged Lands Act of May 22, 1953 (SLA), 43 U.S.C. || 1301, 1313 (1982), and the l982 Chugach Natives, Inc. (CNI) Settlement Agreement between the United States, the State of Alaska, and CNI, now CAC.

Section 6(m) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 343, 48 U.S.C. note preceding section 2l (l982), provides: "The Submerged Lands Act of l953 (Public Law 3l, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing states thereunder." Section 3 of the SLA, 43 U.S.C. | l3ll (l982), confirms establishment of title to lands beneath navigable waters in the respective states. Section 5, 43 U.S.C. | l3l3

2/ Navigability is not at issue (Statement of Reasons (SOR) at 2; BLM Answer at 5; BLM Exh. G).

(l982), excepts from such confirmation "all lands expressly retained by or ceded to the United States when the State entered the Union."

Section 6 of the l982 CNI Settlement Agreement states that the Secretary of the Interior shall convey to CNI the "exclusive right" to Katalla area oil and gas (BLM Exh. H at 2). The agreement also provides, however, that excepted from any conveyances of land to CNI shall be "any submerged land" the title of which has passed to the State of Alaska (SOR at 2).

The State argues that the Katalla riverbed and ownership of the resources thereunder vested in the State on January 3, l959, the date of Alaska Statehood, pursuant to the equal-footing doctrine, as confirmed by the SLA. Under the equal-footing doctrine, the United States holds the lands under navigable waters in the territories in trust for the future states, and, absent a prior conveyance by the Federal Government to third parties, a state acquires title to such lands upon entering the Union on an "equal-footing" with the original l3 states. Utah Division of State Lands v. United States, ___ U.S. ___, l07 S. Ct. 2318, 2319 (l987), Montana v. United States, 450 U.S. 544, 55l (l98l). The State argues that the exceptions in section 5 of the SLA (43 U.S.C. | l3l3 (l982)) do not apply to the Katalla riverbed because of operation of the equal-footing doctrine.

BLM contends that the United States has always had the power to set apart submerged lands within a territory in a Federal reservation or to dispose of such lands to third parties while the land is in territorial status. Such powers of disposal, BLM points out, have been exercised by Congress through legislation, by the President and Senate, and by trea-
ties, or through the executive branch as authorized by statute. BLM asserts that the equal-footing doctrine is limited by exceptional circumstances or public exigencies which would prevent submerged lands from vesting in a state at the time of admission to the Union. BLM contends that under the "expressly retained or ceded" language of section 5 of the SLA or under the equal-footing doctrine, the question is whether the United States intended to include submerged lands in a Federal reservation so as to preclude their passage to the State upon statehood. BLM argues that the documents creating the Chugach National Forest reservation "clearly establish the inclusion of the Katalla riverbed as part of the reservation" (Answer at l0). BLM lists the purposes of the Chugach reservation--protection of fisheries and wildlife, waterflow regulation and production of timber--and argues that these purposes clearly indicate an intent to include the submerged lands in the reservation (Answer at l5).

[l] The authority dispositive of this appeal is Utah, supra, where
the Court referred to a historical congressional policy to grant away land under navigable waters "only in case of some international duty or public exigency." Id. at 232l (emphasis in original). The Court held that title to the bed of Utah Lake passed to Utah upon that State's admission to the Union in l896, notwithstanding the reservation of the lake as a reservoir site prior to statehood. In reaching this holding, the Court stated certain

principles that must be followed when determining whether a state has title to land beneath navigable waters:

> [W]e do not lightly infer a congressional intent to defeat a State's title to land under navigable waters:
>
> > "[T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposal by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." United States v. Holt State Bank, 270 U.S. 49, 55, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926).
>
> We have stated that "[a] court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream" Montana v. United States, 450 U.S. 544, 552, 101 S.Ct. 1245, 1251, 76 L.Ed.2d 493 (1981) (internal quotations and citations omitted). Indeed, in only a single case--Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970)--have we concluded that Congress intended to grant sovereign lands to a private party. The holding in Choctaw Nation, moreover, rested on the unusual history behind the Indian treaties at issue in that case, and indispensable to the holding was a promise to the Indian Tribe that no part of the reservation would become part of a state. Montana v. United States, supra, 450 U.S., at 555, n. 5, 101 S. Ct., at 1253, n. 5. Choctaw Nation was thus literally a "singular exception," in which the result depended "on very peculiar circumstances." Ibid.

107 S. Ct. at 2321.

After setting forth the foregoing principles which apply to conveyances made prior to statehood, the Court extended them to reservations:

> Given the longstanding policy of holding land under navigable waters for the ultimate benefit of the States, therefore, we would not infer an intent to defeat a State's equal-footing entitlement

> from the mere act of reservation itself. Assuming arguendo that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that congress affirmatively intended to defeat the future State's title to such land.

107 S. Ct. at 2323-24. Under the Court's guidelines, a finding for BLM in the case at bar would have to be based on evidence that Congress clearly intended to include the Katalla riverbed within the Chugach National Forest and that Congress affirmatively intended to defeat the future State of Alaska's title to such land. The record before us supports neither of these findings. Two of the executive proclamations establishing the Chugach National Forest are based on section 24 of the Act of March 3, 1891, 26 Stat. 1095, 1103, which authorized the President to

> set apart and reserve, in any State or Territory having public lands bearing forests, in any part of the public lands wholly, or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservation, and the limits thereof.

Three of the proclamations cite the Act of June 4, 1897, 30 Stat. 11, which authorizes modification of a boundary or reduction in area of a reservation. 30 Stat. at 36. None of the establishing documents refers even remotely to lands under navigable waters or manifests a congressional intent regarding disposition of riverbed lands. There is no clear and especial language to indicate that Congress intended to defeat the State's title to the Katalla riverbed lands. 3/

BLM argues that despite its holding, Utah, supra, supports the conclusion that the State's title to submerged lands is defeated where the facts demonstrate "strong explicit or inferred intent" to include such lands in a Federal reservation prior to statehood. The facts here, however, do not show that Congress clearly intended to include land under navigable waters within the Chugach National Forest reservation or that Congress affirmatively intended to defeat the future State's title to that land. In accordance with Utah, supra, we hold that the submerged lands beneath the Katalla River had passed to the State of Alaska pursuant to the Statehood Act and were therefore unavailable for conveyance by BLM. See Cook Inlet Region, Inc. (On Reconsideration), 100 IBLA 50 (1987).

3/ The 1897 Act authorizes the establishment of public forest reservations "for the purpose of securing favorable conditions of water flows." 30 Stat. at 35. However, the Supreme Court noted in Utah that "'Congress has never undertaken by general laws to dispose of' land under navigable waters." 107 S. Ct. at 2324.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision is reversed to the extent it approved for conveyance to CAC the oil and gas interest in the Katalla riverbed.

Gail M. Frazier
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Anita Vogt
Administrative Judge
Alternate Member

January 6, 1994

IBLA 85-768	:	AA-50379
	:	
STATE OF ALASKA	:	ANCSA Regional Selection
102 IBLA 357 (1988)	:	
	:	Decision Reinstated; Stay Lifted

ORDER

By memorandum dated December 20, 1988, from the Secretary of the Interior to the Director of the Office of Hearings and Appeals (OHA), the Secretary advised: "I have requested that the Solicitor undertake a review of the Utah decision [Utah Division of Lands v. United States, 482 U.S. 193 (1987) (Utah Lake)] and its applicability to both [Public Land Order No.] PLO 82 and the withdrawal establishing the Chugach National Forest." The Secretary then directed the Director to reopen the above-captioned case decided by the Board's opinion in State of Alaska, 102 IBLA 357 (1988), and stay the effect of the Board's decision pending further guidance from the Secretary. 1/ On January 12, 1989, the Board issued an order to that effect.

On April 20, 1992, the Solicitor issued an opinion (M-36911 (Supp. I)) entitled "Ownership of Submerged Lands in Northern Alaska in Light of Utah Division of State Lands v. United States," 100 I.D. 103 (1992), in which the Secretary concurred. By memorandum to the Deputy Solicitor, dated April 28, 1992, the Director, OHA, expressed uncertainty on the issue of whether the Secretary had actually assumed jurisdiction in this case. Therein the Director pointed to the Solicitor's Opinion at 100 I.D. 105:

> The Secretary then assumed jurisdiction of two cases before the Interior Board of Land Appeals (IBLA) pending guidance from the Solicitor on the effect of the PLO 82 and Chugach National Forest withdrawals in light of the Utah Lake decision. 10/

10/ The Secretary's assumption of jurisdiction was pursuant to 43 C.F.R. § 4.5. First, Secretary Hodel directed the IBLA to stay Morgan Coal Co., IBLA 86-1234, a challenge by the State of Alaska to the Department's position on PLO 82. Second, he directed the IBLA to reopen and stay State of Alaska (Katalla River), IBLA 85-768, 102 IBLA 357 (1988), a dispute over rights to oil and gas in the bed of the Katalla River.

1/ The Secretary also directed the Board to stay consideration of IBLA 86-1234.

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The Director noted that despite the above representation that the Secretary assumed jurisdiction of the two Board cases identified, neither the Secretary's memorandum of December 20, 1988, or any other document in the case records stated that it was in fact the case. He then requested guidance "concerning whether the Board should take any further action in these two cases, in accordance with the April 20, 1992, opinion, or whether the Board should transfer the case records in these two cases to the Secretary in accordance with 43 CFR 4.5(c)."

By memorandum dated August 6, 1992, the Deputy Solicitor responded in part:

> We do not believe that the Secretary asserted jurisdiction over those two cases for decisions on the merits. Rather, our understanding is that those decisions by IBLA were to be stayed pending the outcome of this Office's legal review of the PLO 82 opinion. With that review complete, we see no basis for further delay of action on the part of IBLA.

The case records have been returned to the Board. The Board, sua sponte, examines its decision at 102 IBLA 357, and the Stay in light of the Solicitor's Opinion, to determine whether reconsideration is warranted.

The Solicitor's Opinion contains an exhaustive analysis of the Utah case, and it applies that analysis to PLO 82, concluding that the submerged lands embraced by PLO 82 were, in fact, withdrawn by it, and therefore, did not pass to the State of Alaska upon Alaska Statehood. The Solicitor's Opinion acknowledged the two-pronged test articulated by the Supreme Court in the Utah Lake decision to determine whether a Federal reservation of public land defeats a state's equal footing entitlement. The Solicitor's Opinion found no indication that the Court intended to create a new principle of law or to place an impossible burden on the Federal Government's ability to show that it has exercised its constitutional power to reserve its own property for its own use. 100 I.D. at 119, 124. Further, the Solicitor's Opinion expressly limited the controlling effect of its analysis:

> The analysis in this Opinion is controlling in the disposition of those cases before the Department pertaining to the area withdrawn by PLO 82, e.g., the Morgan Coal case, see supra n. 10. This Opinion does not determine the effect of the Utah Lake decision on the Chugach National Forest withdrawal (Katalla River case).

100 I.D. at 106 n.17.

As established in 1943, PLO 82 originally withdrew three tracts of land in distinct regions of Alaska for military purposes: Northern Alaska,

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the Alaska Peninsula, and Katalla-Yakataga. See 100 I.D. at 107. The Solicitor's Opinion proceeded to consider the consequences of PLO 82 on only the first tract, Northern Alaska, because the withdrawal was no longer in effect for the latter two tracts at Alaska's Statehood: "On August 14, 1946, Acting Secretary of the Interior Oscar L. Chapman issued PLO 323 (11 FR 9141 (1946)), which revoked the withdrawals of the Alaska Peninsula and Katalla-Yakataga tracts formerly withdrawn under PLO 82. Accordingly, after this date PLO 82 applied only to northern Alaska lands." 100 I.D. at 110; see also 100 I.D. at 141 n.92. Thus, the reason for which the instant case was reopened, i.e., to determine the applicability of the Utah Lake decision to the withdrawal establishing the Chugach National Forest, does not involve the PLO 82 withdrawal segregating these lands, as it was not applicable at the time of Statehood. After 1946, the only applicable withdrawal of lands for the Katalla-Yakataga area in general was the one establishing the Chugach National Forest.

Based on our review, we conclude that our decision in State of Alaska, supra, is in harmony with the reasoning set forth in the Solicitor's Opinion and determine that reconsideration of State of Alaska is not warranted. The Solicitor's Opinion opined that in order to defeat a future states's title to submerged lands, the two-pronged test articulated in Utah Lake must be successfully applied. That test requires a determination that Congress (1) clearly intended to include land under navigable waters within the reservation and (2) affirmatively intended to defeat future state title to such land. 100 I.D. at 119-24. Applying this to PLO 82 lands, the Solicitor's Opinion rationalized that PLO 82 clearly intended to include lands underlying navigable waters, that through PLO 1621 the Executive Order intended to defeat Alaska's future title to submerged lands within certain areas of PLO 82, and that Congress affirmed this executive intent in the Alaska Statehood Act. This judgment was based on the conclusion that section 11(b) of the Alaska Statehood Act is an express retention of lands for military purposes within the meaning of section 5(a) of the Submerged Lands Act. 100 I.D. at 160-61.

The Submerged Lands Act of 1953, 43 U.S.C. §§ 1301, 1311(a), and 1312 (1988), granted and confirmed to the states title to the lands beneath inland navigable waters within the states, and granted to the states the submerged lands within the boundaries of the states lying off their coasts. See 100 I.D. at 117. However, section 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), exempts certain categories of lands from the general grant including: "[A]ll lands expressly retained by or ceded to the United States when the State entered the Union." Section 6 of the Alaska Statehood Act, 72 Stat. 339, 340-43 (1958), contains 13 major subdivisions with one or more grants or confirmations of title. Section 6(m) of the Alaska Statehood Act, 72 Stat. 343, provides in full: "The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat.

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29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder." Acknowledging a subtle distinction between the Utah Lake test and the Submerged Lands Act guide-lines, see 100 I.D. at 148-49, the Solicitor's Opinion applied both to determine that Congress demonstrated an intent to defeat state title to submerged lands and retain them for Federal purposes. The Solicitor's Opinion carefully scrutinized section 11(b) of the Alaska Statehood Act, 72 Stat. 347-48, which retains certain lands owned by the United State prior to statehood and held for military purposes, so as to allow the continued use of the lands for those purposes, and accepted it as the basis for its conclusion that the lands in PLO 82 were not conveyed to the State at statehood.

In the instant case, we have already applied the Utah Lake test to the question of whether Congress intended to defeat the State's title to the Katalla riverbed. 102 IBLA at 361. In particular, we noted that "[t]here is not clear and especial language" to that effect, nor do the facts show that Congress clearly intended to include navigable waters within the Chugach National Forest. Id. We find nothing in the Solicitor's Opinion to contradict the analysis, reasoning, or result reached therein. In the absence of a clear retention of lands similar to what was expressed in section 11(b) in the Alaska Statehood Act in the case of PLO 82 lands, we cannot find that the section 5(a) exemption in the Submerged Lands Act to be applicable in this case. Rather, we find that in section 6(m) of the Alaska Statehood Act, 72 Stat. 340, Congress expressed an intention for vacant and unappropriated national forest lands to be available for conveyance to the State.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision in State of Alaska, supra, reversing BLM's decision to the extent it approved for conveyance to Chugach Alaska Corporation the oil and gas interest in the Katalla riverbed, is affirmed and reinstated, and the Stay is accordingly lifted.

Gail M. Frazier
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Anita Vogt
Alternate Member

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